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No. 84-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BUCKINGHAM CORPORATION
Petitioner,

v.

THE ODOM CORPORATION,
d/b/a ARIZONA DISTRIBUTING COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

DANIEL S. MASON
(Counsel of Record)
FREDERICK P. FURTH
CRAIG C. CORBITT
MICHELE C. JACKSON
FURTH, FAHRNER, BLUEMLE & MASON
Furth Building, Suite 1000
201 Sansome Street
San Francisco, California 94104
Telephone: (415) 433-2070

H. J. LEWKOWITZ
RAWLINS, BURRUS & LEWKOWITZ
Valley Bank Center, Suite 2300
Phoenix, Arizona 85073
Telephone: (602) 257-5700

Attorneys for Respondent

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QUESTION PRESENTED

Did the Court of Appeals err in holding that there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict?

PARTIES TO THE PROCEEDINGS

The Arizona Distributing Company division of The Odom Corporation was sold to Foremost-McKesson Inc. on March 8, 1983. The entity is now known as McKesson Wine & Spirits dba Arizona Distributing Company. The Odom Corporation retained all causes of action relating to this case.

The subsidiaries of The Odom Corporation are: Campco, Alaska, Inc.; Campco Pacific, Inc.; Clearwater Beverage, Inc.; Famous Brands, Inc.; and S & D Investments, Inc.

Petitioner's parent and affiliates are listed in the Petition. In addition to petitioner and respondent, the parties in the court below included Copper State Distibutors, Inc. and Mazel Corporation. These parties also have an interest in the outcome of the appeal. Upon information and belief, the parents and affiliates of Mazel Corporation and Copper State Distibutors include: Peerless Importers, Inc.; Johnny Barton, Inc.; All American Distributing Co., Inc.; and Klick Distributing Co.

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION

This Court is asked by petitioner to grant *certiorari* in this case because the Court of Appeals for the Ninth Circuit allegedly failed to follow the holding of *Monsanto Company v. Spray-Rite Service Corporation,* 104 S.Ct. 1464 (1984). However, the Court of Appeals explicitly based its decision on *Monsanto,* and directed the district court to apply *Monsanto* when instructing the jury at the retrial. Petitioner is really asking this Court to review the evidence, under the same legal standard which was applied by the Court of Appeals, and substitute its judgment for that of the Court of Appeals.[1]

[1] The following abbreviations are used in this brief: "Tr." (trial transcript); "Exh." (trial exhibit); "CR" (district court docket number); "Pet." (Buckingham's Petition for Certiorari); "Pet.App." (Appendix to Petition); "Resp.App." (Appendix to this brief).

COUNTERSTATEMENT OF THE CASE

In its Statement Of The Case, petitioner selectively recasts the evidence, compartmentalizes it, and then draws every possible inference in its favor. This is contrary to the rule that the evidence must be considered as a whole, in the light most favorable to respondent, to determine whether reasonable jurors could have found in respondent's favor.[2]

I.

Respondent's Termination.

Through its former subsidiary, Arizona Distributing Company ("ADC"), respondent introduced Cutty Sark scotch whiskey to the state of Arizona, and distributed it continuously until its distributorship was terminated in 1981. Tr. 196-97. During that time, relying on Buckingham's representation of a "partnership," ADC expended over $800,000 for local advertising of the product, notwithstanding Buckingham's total control over such expenditures; as a result, Cutty Sark was unprofitable to ADC. Tr. 198-201, 236, 257, 283. Nevertheless, Cutty Sark was a "necessary evil," because, as one of the "big four" premium scotches (Pet., p. 5; Tr. 81), it was a "door opener" for the remainder of respondent's products. Tr. 201-02. Until 1981, the business relationship between petitioner and respondent was "outstanding." Tr. 406-07, 412-13; Exh. 12. Respondent played a large role in helping to build Cutty Sark into one of the leading brands of scotch whiskey in the country. Tr. 199.

When new management assumed control in late 1980, Buckingham underwent a major change in its pricing philosophy. Richard Newman, Buckingham's new president, insisted that Cutty Sark pricing be "firmed up" to be "in line" with the other premium scotches: J & B, Johnny Walker Red, and Dewar's. Pricing of Cutty Sark had been "bastardized," according to Newman, because "wholesalers were competing against each other." Tr. 409-10, 417. Buckingham's objective

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[2] Pet.App. C, p. 11a; *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Cullinan* v. *Burlington Northern, Inc.*, 522 F.2d 1034, 1036 (9th Cir. 1975).

was to establish Cutty Sark retail prices in a "parity relationship" with the rest of the "big four." Tr. 675. Nevertheless, although Buckingham "suggested" and discussed resale prices, it ostensibly recognized its obligation not to dictate such prices or to become involved in pricing disputes between its distributors. Tr. 121, 437-38, 458-59, 625.[3]

In late April 1981, ADC ran a special 10-day discount on Cutty Sark (Tr. 207-10; Resp.App. A; Exh. 101) which Buckingham regarded as "excessive." Tr. 449. Although Buckingham later claimed that its real objection was that this discount was done "without a plan" (Tr. 1[illegible]8-19, 450), in fact, the discount was part of a carefully coordinated effort which successfully stimulated sales. Tr. 207-15, 294, 345-46, 367-71.

Immediately upon learning of ADC's discount, Bernard Gellerman, the president of Copper State (ADC's competitor), telephoned Kenneth Ahlburg, petitioner's Vice President and Western Division Manager, whose office was in Los Angeles. Gellerman was "upset"; he called the discount "ridiculous," and assured Ahlburg that he was "not going to compete with that price." Tr. 585-86, 631-32. Instead of ignoring these complaints, as company policy required, Ahlburg demanded to know "what the hell [was] going on in Arizona" (Tr. 585), and promised Gellerman that "we'll find out what's going on." Tr. 633-34, 705. Ahlburg instructed Terry Lichtenberger, the regional sales manager, to investigate and confront Jack Braddock, ADC's president. Tr. 634, 705.

Soon thereafter, Gellerman again complained, this time to Lichtenberger, that respondent was "screwing up the market." Tr. 455-56. Gellerman, upset because he was no longer "controlling the market," demanded that Buckingham "do

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[3] Petitioner incorrectly claims that "[t]here was no evidence that Buckingham in any way suggested the actual price charged by ADC or Copper State for Buckingham's brands." Pet., p. 5. Besides the inferences to be drawn from Buckingham's conduct following ADC's April 1981 discount (discussed below), there was direct testimony that Buckingham suggested discounts:

"Q. . . . Is it your practice to always suggest discounts off of list price?

"A. We do that when we have an increase in price to the distributor. I think we heard testimony before that we like to be in a particular category." (Tr. 433 (Lichtenberger).)

something about it." Tr. 455-57, 464. Once again, instead of ignoring this protest, Lichtenberger promised to see Braddock. Tr. 461-62.

Lichtenberger relayed Gellerman's complaints to Braddock, who explained that since Copper State, through lower pricing, had outsold ADC in recent months, the discount had been initiated to stimulate sales, encourage ADC's sales force, and "to show the competition [*i.e.*, Copper State] that we were still in the business of selling Cutty Sark." Tr. 217-19, 462-63. Lichtenberger reported back to Ahlburg, who responded that he did not "appreciate this type of thing happening." Tr. 471, 475, 478.

Ahlburg next telephoned his superior, Stephen Karp, petitioner's Senior Vice President, in New York. Once more, instead of instructing Ahlburg to ignore this pricing dispute between petitioner's distributors, Karp directed Ahlburg to go to Phoenix to investigate. Tr. 109, 635. Ahlburg went to Phoenix and confronted Braddock, who repeated the explanation he had given Lichtenberger. Tr. 221-22, 640-41. Ahlburg warned Braddock that such discounting was "definitely against" petitioner's new philosophy, and that Buckingham wanted, "in the future, [to] have a say in the programming of the brand," *i.e.*, "to outline [respondent's] discounts." Tr. 221-22 645.[4]

Later that same day, Ahlburg met Gellerman. Ahlburg repeated portions of his conversation with Braddock. Gellerman assured Ahlburg of his belief that discounts were a "stupid move." Tr. 592-93, 596-97. When told of Braddock's statement that Copper State had priced below respondent from time to time, Gellerman replied: "I swear I've never done that" or "I swear I've not been doing any such pricing." Tr. 589, 591-93, 712; Exh. 101. Gellerman then asked for the line on an exclusive basis, *i.e.*, for the termination of respondent, and promised: "I will make this kind of commitment, whatever it takes to build this brand I'm here to do it." Tr. 712-13.

[4] "Programming" means pricing and discounting of a product, as well as other aspects of marketing. Tr. 233, 361.

Ahlburg promised Gellerman that he would recommend respondent's termination. Tr. 519, 592, 713.[5]

The next day, Ahlburg returned to Los Angeles and telephoned his report and recommendation to Karp. Karp told Alhburg to put things "down on paper." Tr. 110, 647-50, 714-15. Ahlburg did so in the form of a memorandum to Karp (the "Ahlburg Memorandum"), dated April 29, 1981, to which he attached a copy of respondent's "deal sheet" listing the April discounts. Tr. 653-55; Exh. 101, Resp.App. A.[6] This document—the only document in the case which discussed the reasons for the termination (Tr. 660-61)—repeated Ahlburg's unhappiness with respondent's discounting, reported Gellerman's "swearing" that he had not done the same, and concluded by recommending the termination of ADC. Exh. 101, Resp.App. A.

Before this time, Karp had been "non-committal" about the situation in Arizona. Tr. 107. In late April, he received the Ahlburg Memorandum (Tr. 109), and sometime thereafter recommended to Newman that ADC be terminated. Newman relied totally on Karp's oral recommendation, and devoted about five minutes to the decision. Tr. 667-71. By June or early July 1981, Karp told Ahlburg that Buckingham was "going to go" with the termination. Tr. 662. ADC was notified on August 17, 1981. Tr. 296; Exh. 103.[7]

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[5] Gellerman's testimony flatly contradicted Ahlburg's and Lichtenberger's in a number of important respects. For example, Gellerman first admitted, then denied, that he had discussed pricing or discounting at all, denied that Ahlburg had said anything about meeting Braddock, and "did not recall" his complaining statements to Lichtenberger. Tr. 509-11, 513, 585-18, 569, 582-83. Gellerman even denied that he had complained to Ahlburg at all about respondent's discounts, asserting: "[I]f I would have said anything to him about the discounts I know his words would have been, 'Hey, if you can't stand the heat get out of the kitchen.' I wouldn't have said anything." Tr. 568.

[6] Although petitioner reproduced the Ahlburg Memorandum in its appendix (Pet.App. G, p. 22a), it failed to include the "deal sheet," which was also a part of Exhibit 101. Respondent has reproduced the entire exhibit as its Appendix A to this brief.

[7] Petitioner insisted that pricing was "irrelevant" to the decision to terminate (Tr. 651), and continues to advance other reasons. Pet., p. 4. Respondent presented evidence from which the jury could have rejected all of these reasons:

(Footnotes continued on following page)

II.

Proceedings Below.

Although it portrays itself as having been dragged into litigation as the helpless victim of circumstances, in fact it was petitioner which initiated this case and was the plaintiff in the district court. On August 25, 1981, only one week after respondent was notified of its termination, petitioner filed an action for declaratory judgment. CR 1. Respondent answered and counterclaimed on September 16, 1981, adding Copper State and its parent Mazel Corporation as counterdefendants, and alleging, *inter alia*, that it was terminated pursuant to unlawful concerted action to eliminate price competition, in violation of the Sherman Act, 15 U.S.C. §1. CR 19. Following an expedited discovery schedule, a jury trial commenced on November 17, 1981. Petitioner and Copper State moved for a directed verdict following three days of testimony. The district court changed its mind three times before finally granting the motion (Tr. 807, 873, 888), on the ground that there was "no evidence to show that [counterdefendants] acted in concert." Tr. 888, Pet.App. D, p. 17a. Judgment was entered on December 10, 1981. Pet.App. E.

(Footnotes continued from preceding page)

First, Copper State's "victory" in the "wine contest" was due to greater inventory; ADC abandoned the contest after one month when advised by Lichtenberger that it could not catch up without paying a surcharge over the usual price to obtain more wine. Tr. 229-31, 286-87, 324-27. Moreover, Buckingham's president testified that the results of the wine contest were irrelevant to a distributor's ability to sell Cutty Sark. Tr. 692.

Second, contrary to petitioner's assertion (Pet., p. 4), the record did *not* show that "Copper State's comparative sales performance figures were consistently higher than ADC's." Respondent's total sales were higher through 1981 until its termination, and had increased by a greater margin during the preceding year. Tr. 207-08, 570-71, 680; Exh. 50.

Third, Braddock explained that his "necessary evil" comment reflected no lack of commitment; indeed, respondent had sold the product for 25 years on an unprofitable basis precisely because it has such a commitment. Tr. 198-202.

Fourth, in view of Gellerman's denials on the stand of statements made by *petitioner's* witnesses (*see* note 5, *supra*), and his trial demeanor (which of course cannot be observed on appeal), the jury could have concluded that he perjured himself, and rejected not only his testimony but petitioner's claim that he "had persistently displayed his commitment." Pet., p. 4.

In an unpublished memorandum filed February 25, 1983, the Court of Appeals reversed, holding that "there was sufficient circumstantial evidence of concerted action to withstand the motion for a directed verdict." Pet.App. C, p. 11a. Contrary to petitioner's surmise that the Court of Appeals considered only two items of evidence and ignored other critical evidence, it is clear from the Court of Appeals' memorandum that petitioner's evidence was considered fully:

> "Buckingham presented evidence that it terminated ADC in its independent discretion and for legitimate business reasons unrelated to price. This evidence included Buckingham's desire to upgrade the Cutty Sark image, its desire for an eager distributor to whom Buckingham's brands would be important, the results of the wine contest, the comparison of growth in Cutty Sark sales prior to the April discount, the 'Ceccarelli' testimony, and the Finlandia discount.
>
> "Viewing the evidence in the light most favorable to Odom, however, we find that there was sufficient evidence to support a jury verdict in its favor by reasonable persons. Particularly persuasive are the 'Ahlburg Memorandum' which focused on the pricing reasons for the termination, and Gellerman's offer to make a 'commitment' in exchange for an exclusive distributorship. While Gellerman might have only meant a commitment to sell the product aggressively, a reasonable jury might have interpreted it as an offer to let Buckingham have some control over price. We therefore conclude that the district court erred in granting a direct verdict." (Pet.App. C, pp. 11a-12a.)

On April 2, 1984, this Court vacated the Court of Appeals' February 25, 1983 decision, and remanded for reconsideration in light of *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). Pet.App. I. The Court of Appeals ordered the parties to submit additional briefs concerning the impact of *Monsanto* on its prior ruling. On August 7, 1984, in another unreported decision, the Court of Appeals held that *Monsanto* dictated the same result it had previously reached, *i.e.*, that sufficient evidence of conspiracy had been presented to allow reasonable jurors to rule in respondent's favor:

> "The initial memorandum disposition in this case is reinstated. We applied the same test as required by *Monsanto Co. v. Spray-Rite Service Corp.*, __U.S.__, 104 S.Ct. 1464 (1984), namely, that there be sufficient evidence to overcome a motion for a directed verdict on the question of whether there was a common scheme (an agreement between Buckingham and Copper State) designed to achieve price control, and that Odom was terminated as a result. '[T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor.' *Id* at 1471. The district court should apply the specific standard announced in *Monsanto* when instructing the jury on the standard of proof." (Pet.App. B, pp. 7a-8a.)

On September 28, 1984, the panel voted unanimously to deny Buckingham's petition for a rehearing. No judge of the full court requested a vote on Buckingham's suggestion of a rehearing *en banc*. Resp.App. B.

REASONS FOR DENYING THE WRIT

Petitioner's make-weight arguments notwithstanding, the only issue here is whether the Court of Appeals complied with this Court's directive to consider whether the evidence meets the *Monsanto* standard. Dissatisfied with the Court of Appeals' unambiguous statement that it did exactly that, petitioner invites this Court to scrutinize the evidence, not for the purpose of clarifying an unsettled area of law or resolving a conflict among the circuits, but simply to second-guess the result reached by the Court of Appeals in applying the *Monsanto* standard. This would be a pointless exercise. Both the evidence and the Court of Appeals' judgment after reviewing that evidence are entirely consistent with *Monsanto*. The result fully satisfies *Monsanto's* holding that mere complaints followed by termination are not enough to infer a supplier-distributor price-fixing conspiracy, and that evidence tending to exclude the possibility of independent action is necessary.

There is no basis on this record for the Court to select this case as a vehicle to reconsider the rule of *per se* liability for vertical price-fixing. This issue was first raised by petitioner in its initial petition for certiorari, and has not been considered by

the Court of Appeals. Moreover, given the desire of Congress to retain the *per se* rule, reconsideration of the standard by this Court is unwarranted.

Finally, the Court should decline to review the decision of the Court of Appeals because that decision is interlocutory.

I.

The Decision Of The Court Of Appeals Is Fully Consistent With Monsanto

Respondent has conceded throughout this case that proof of concerted action is necessary, *i.e.*, that it must prove that Buckingham and Copper State "had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). This long-established principle is the essence of the *Monsanto* decision, which held that mere complaints from a rival distributor followed by termination are not enough for "a meeting of the minds," but rather, evidence must be offered "that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently." *Monsanto*, 104 S.Ct. at 1471.[8]

Since respondent never relied upon complaints alone, but instead presented substantial evidence tending to exclude the possibility of independent action, *Monsanto* is entirely consistent with the result reached by the Court of Appeals.[9]

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[8] Although the Court referred to "direct" evidence of agreements between Monsanto and distributors to maintain prices (consisting of threats made by Monsanto to another distributor after Spray-Rite had been terminated (*see* 104 S.Ct. at 1471)), it relied upon circumstantial evidence to link the termination of Spray-Rite to the conspiracy. 104 S.Ct. at 1472. We do not understand the Court to have held or implied that direct evidence is *required* in such cases, or that the evidence presented by Spray-Rite constitutes a minimum level which plaintiffs must reach. The Court has consistently held that direct evidence is not necessary to prove an unlawful conspiracy. *E.g.*, *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (per curiam); *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-43 (1966); *American Tobacco Co.* v. *United States*, 328 U.S. at 809-10.

[9] It is clear from the Court of Appeals' Memorandum Decision that it required "evidence of concerted action," and not simply evidence of Copper State's complaints followed by ADC's termination. The Court of Appeals

(Footnotes continued on following page)

The evidence in this case which tended to exclude the possibility of independent action was abundant. The Ahlburg Memorandum was the only document in the case which discussed Buckingham's reasons for the termination, and it referred to only one reason—price. Exh. 101, Resp.App. B. Ahlburg's statement that "I spoke to Bernie Gellerman and he swears he has not been doing any such pricing," when placed in the context of the other evidence, certainly permitted the inference of an understanding between Copper State and Buckingham that Copper State would not engage in the discounting which Buckingham found so offensive. The inference that Copper State would acquiesce to Buckingham's wishes regarding pricing was strengthened by Gellerman's promised "commitment" to Buckingham in exchange for the termination of ADC, a commitment backed by Gellerman's assurances that he regarded such discounts as a "stupid move" and swearing that he was not a price-cutter. Tr. 589, 591-93, 596-97, 712; Exh. 101, Resp.App. A.

The importance placed by Buckingham on a commitment by Copper State to toe the line on pricing was further bolstered by the evidence of Buckingham's desire to "firm up" Cutty Sark prices (Tr. 409-10); by Ahlburg's warnings to Braddock that discounting violated Buckingham philosophy and that Buckingham wanted "to outline [ADC's] discounts" (Tr. 221-23, 645); and by Lichtenberger's statement that ADC was terminated because it violated Buckingham's new philosophy (Tr. 481). Moreover, the jury observed the sharp conflict in the testimony of Gellerman, Ahlburg, and Lichtenberger on crucial issues (*see* note 5, *supra*), and was presented with evidence which thoroughly discredited the asserted nonprice reasons for the termination *(see* note 7, *supra*). In short, respondent presented substantial evidence "both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Monsanto,* 104 S.Ct. at 1471, n.9.[10]

(Footnotes continued from preceding page)
emphasized the evidence of "the pricing reasons for the termination," and Gellerman's "offer to let Buckingham have some control over price," *i.e.,* evidence of a meeting of the minds between Buckingham and Copper State to engage in resale price maintenance. Pet.App. C at 11a-12a.

[10] While differing in some respects, much of the evidence in *Monsanto* was a good deal less persuasive than the evidence in this case. For example, there was no document corresponding to the Ahlburg Memorandum which

(Footnotes continued on following page)

Petitioner devotes much of its argument to the contrary, nonconspiratorial inferences it would have this Court draw from the evidence. This exercise has little bearing on the issue as properly framed, which is whether the evidence meets the *Monsanto* standard with all reasonable inferences drawn in *ADC's* favor, not Buckingham's. Lacking a credible argument that the inferences which the Court of Appeals already found to be reasonably drawn in ADC's favor are insufficient in light of some higher standard set by *Monsanto,* Buckingham instead attacks the inferences themselves, asking the Court to reexamine the evidence and substitute its view for that of the Court of Appeals of what inferences reasonably can be drawn. However, petitioner provides no basis for this Court to alter the Court of Appeals' determination that an understanding between Buckingham and Copper State can be inferred from the evidence.[11]

(Footnotes continued from preceding page)

directly linked Spray-Rite's termination to pricing reasons and referred to price assurances from a competing distributor. There was no evidence of any conversation between Monsanto and a competing distributor which linked the termination of Spray-Rite, discussion of pricing philosophy, and a "commitment" by the competing distributor in the same conversation. In fact, there was no evidence of *any* complaints about Spray-Rite's pricing for the 15 months prior to its termination, although the Court held that such complaints could be inferred from evidence that some complaints occurred after the termination. 104 S.Ct. at 1473, n.14. As does Buckingham, Monsanto contended that it acted unilaterally, and offered nonprice reasons for the termination such as insufficient promotion and lack of technically trained personnel. *See Spray-Rite Service Corp.* v. *Monsanto Co.,* 684 F.2d 1226, 1239 (7th Cir. 1982), *aff'd,* 104 S.Ct. 1464 (1984). The Court held that "despite the sharp conflict in evidence the case properly was submitted to the jury." 104. S.Ct. at 1473, n. 14.

[11] Ahlburg's rehearsed denials to questions posed by his own counsel (Pet.App. H) hardly demolish respondent's version of the evidence. It would be a rare case indeed in which an alleged antitrust conspirator made such admissions on direct examination. Even if the precise words were not spoken between Ahlburg and Gellerman, an agreement can be implied from "a course of dealings or other circumstances as well as in any exchange of words." *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809-10 (1946). A "knowing wink can mean more than words." *Esco Corp.* v. *United States,* 340 F.2d 1000, 1007 (9th Cir. 1965). *Cf. Girardi* v. *Gates Rubber Co.,* 325 F.25 196, 201-02 (9th Cir. 1963) (in light of the complaining distributor's interest, the jury was not obliged to accept as true his assertions that he did not ask the supplier to do something about plaintiff's pricecutting or to terminate plaintiff).

(Footnotes continued on following page)

Petitioner appeals to this Court as jurors to consider what it calls the "most probative piece of evidence" in the case: Braddock's letter, written prior to the inauguration of the Newman regime at Buckingham and more than a year before the events at issue in the case, requesting an exclusive distributorship. Contrary to petitioner's repeated assertion, it was far from "undisputed" that interbrand competition was promoted by the termination of respondent. Petitioner neglects to mention that Copper State already distributed Dewar's, another of the "big four," on an exclusive basis. Tr. 521-22. The termination of respondent thus *eliminated* interbrand competition between two of the four premium scotches in Arizona, since Copper State distributed and was in a position to set the prices for both. Of course, this was consistent with petitioner's avowed goal of establishing the price of Cutty Sark as equally as possible to the prices of J & B, Johnnie Walker Red, and Dewar's—in other words of eliminating price competition with these brands.[12]

(Footnotes continued from preceding page)

Moreover, petitioner conveniently omits Ahlburg's *cross*-examination (Tr. 588-664), in which he discussed the Gellerman meeting in significantly more detail. Tr. 589-96. Apart from his admissions that pricing was discussed, the jury could have discredited Ahlburg's direct testimony by observing his obvious discomfort at having to deviate from a set story on cross-examination:

> "Q. And Mr. Gellerman said to you that what Mr. Braddock is doing is stupid, correct?
>
> "A. I believe he was referring to the discounts with respect to the price raise we were going to take in May.
>
> "Q. Right. You were having a conversation about the fact there was going to be a price increase and also about the fact that here was Braddock engaging in a deep discount, right?
>
> "A. Mr. Mason—
>
> "Q. Yes, sir?
>
> "A. You would help me out a great deal if we could start chronologically, because I could probably get my story across better then." (Tr. 592:25-593:11.)

Ahlburg also indicated that his memory of the exact words spoken might have been a little hazy:

> "Let me explain something. I mean, since that conversation I have had a few unfortunate situations happen, like my house burned down." (Tr. 593:23-25.)

[12] As the court noted in *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers

(Footnotes continued on following page)

Even assuming the accuracy of petitioner's disputed factual contention that interbrand competition ultimately was promoted by the termination, the termination nevertheless was not immunized if it was substantially the product of an unlawful agreement to eliminate price competition. The existence of legitimate reasons for the termination "makes it neither more nor less probable that . . . [petitioner] acted in concert with others rather than unilaterally." *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982). The test is whether the elimination of price competition, pursuant to a meeting of the minds between petitioner and Copper State, substantially contributed to the decision to terminate respondent. *Uniroyal Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *see Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J., concurring). Petitioner stretches the Court of Appeals' reasoning beyond recognition by ascribing to it a belief "that evidence of pro-competitive benefits was not pertinent to determining whether there was sufficient evidence of a price-fixing conspiracy." Pet., p. 10. Nothing in the decision so indicates. Petitioner's attack on the Court of Appeals for its purported "decision"—nowhere stated in the opinion—"that a conspiracy may be inferred notwithstanding undisputed [sic] evidence that a termination was in the supplier's competitive self-interest" (Pet., p. 10) is likewise unwarranted.[13] All that the Court of Appeals determined was that petitioner's evidence, regardless of the weight the jury may ultimately give it, did not so far outweigh respondents' evidence as to compel a directed verdict. "The choice between two reasonable interpretations of the testimony properly was left for the jury." *Monsanto*, 104 S.Ct. at 1472, n.12.

(Footnotes continued from preceding page)

of the affected product, but quite as much *between* that product and competing brands." *Id.* at 52 n.18; original emphasis; *quoting White Motor Co.* v. *United States*, 372 U.S. 253, 268 (1963) (Brennan J., concurring). This case certainly fits that description.

[13] Although the elimination of interbrand price competition between Cutty Sark and Dewar's may have been in petitioner's "competitive self-interest" (Pet., p. 10), "the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated." *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948).

The contention that the Court of Appeals' unpublished decision "frustrates the economic objectives *Monsanto* sought to achieve" is also without merit. This argument requires the factual assumptions that only routine "complaints and inquiries" were made, that petitioner's actions were entirely unilateral, and that the termination promoted interbrand competition; all of these assumptions are disputed.[14] The evidence showed conduct which was far from "inevitable." After *Buckingham,* a supplier is still free to *unilaterally* terminate its distributor, even a price cutter, for whatever reasons it chooses (and an attorney may so advise his or her client); it is still not free to do so pursuant to concerted action with a competing distributor to eliminate price competition. The "Catch 22" perceived by petitioner and the district court is illusory. Had petitioner not engaged in actions which permitted the reasonable inference of action, it would have been free to terminate either wholesaler without fear of antitrust liability. The Court of Appeals' decision that the evidence permitted such an inference is fully consistent with *Monsanto.* [15]

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[14] Petitioner's assertion that complaints from rival distributors about price cutting are inevitable is contradicted by the record. Respondent *never* complained about Copper State's discounts on Cutty Sark (Tr. 208, 530); Braddock only referred to them when petitioner demanded an explanation for respondent's price cutting. The statement that "[i]n each case, the higher price wholesaler complained" (Pet., p.12) is simply wrong.

[15] Other decisions since *Monsanto* are consistent with the result reached by the court below. *See, e.g., Malley-Duff & Associates* v. *Crown Life Ins. Co.,* 734 F.2d 133, 142-144 (3d Cir.), *cert denied,* 53 U.S.L.W. 3417 (Dec. 4, 1984) (directed verdict on plaintiff's dealer termination claim reversed, applying *Monsanto* standard); *Jeanery, Inc.* v. *James Jeans, Inc.,* 1984-2 Trade Cas. (CCH) ¶66,278 (D. Ore, 1984) (summary judgment on dealer termination claim denied, applying *Monsanto* standard). *Roesch, Inc.* v. *Star Cooler Corp.,* 671 F.2d 1168 (8th Cir. 1982), *aff'd by equally divided court,* 712 F.2d 1235 (8th Cir. 1983) (en banc), *cert denied,* 104 S.Ct. 1707 (1984), cited by petitioner, was affirmed by an equally divided Court of Appeals and is of little, if any, precedential value. *See Neil* v. *Biggers,* 409 U.S. 188 (1972).

II.

This Is An Inappropriate Case For The Court To Reconsider The Per Se Rule. Such Reconsideration In Any Event Would Be Unwarranted

Petitioner's final argument is that the Court should use this case as a vehicle to reexamine the rule of *per se* illegality for resale price maintenance. This is a singularly inappropriate case for this purpose, however. Petitioner did not raise this issue on the initial appeal to the Court of Appeals, but waited to present it in its first petition for certiorari. The Court of Appeals did not consider the issue on remand, either. Moreover, although the district court never finally ruled on jury instructions, the case was tried by both sides under the assumption that the *per se* rule would be applied. This Court should not consider the issue in the first instance. *Monsanto,* 104 S.Ct. at 1469 n. 7; *Delta Air Lines, Inc. v. August;* 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 147 n. 2 (1970).

As explained above, it is far from "undisputed" that respondent's termination pursuant to a price-fixing agreement was pro-competitive at either an interbrand or intrabrand level. Even if this case were in a more appropriate procedural and factual posture, however, there would still be no reason for this Court to accept petitioner's suggestion to change the law. The *per se* rule as applied to cases of this type has existed for over 70 years. *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). In recent years, Congress has reaffirmed its approval of this policy. As this Court explained in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977):

> "The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy.... Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade at the option of the individual States.... No similar expression of congressional intent exists for nonprice restrictions."

This congressional intent was again displayed when it passed (and the President signed) Public Law 98-166, 97 Stat. 1071 (1983), an appropriations measure which ordered the Department of Justice to cease spending such appropriations in attempts "to overturn or alter the *per se* prohibition on resale price maintenance in effect under Federal antitrust laws. . ." Particularly given the meager basis which this case would present, the Court should decline petitioner's invitation to reconsider the *per se* rule.

III.

The Court Should Deny Review Because The Court Of Appeals' Decision Is Interlocutory

In reversing the district court's order granting a directed verdict and remanding the case for trial, the Court of Appeals has placed petitioner in the same position it would have been in had the district court denied the motion in the first instance. Petitioner may yet prevail before a jury. If respondent wins the new trial and that judgment is affirmed on appeal, petitioner will still be able to present the same arguments to this Court which it now advances. "Except in extraordinary cases, the writ [of *certiorari*] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.,* 389 U.S. 327, 328 (1967). This is not a case which justifies departure from the Court's traditional practice of denying review of interlocutory decisions.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

DATED: December 19, 1984

Respectfully submitted,

DANIEL S. MASON
(Counsel of Record)

FREDERICK P. FURTH
CRAIG C. CORBITT
MICHELE C. JACKSON
FURTH, FAHRNER, BLUEMLE & MASON
Furth Building, Suite 1000
201 Sansome Street
San Francisco, California 94104
Telephone: (415) 433-2070

H. J. LEWKOWITZ
RAWLINS, BURRUS & LEWKOWITZ
Valley Bank Center, Suite 2300
Phoenix, Arizona 85073
Telephone: (602) 257-5700

Attorneys for Respondent

APPENDIX A

Exhibit 101 (Tr. 113)

MEMORANDUM

PERSONAL & CONFIDENTIAL Date: April 29, 1981

To: Steve Karp From: Ken Ahlburg

Subject: ARIZONA

The state of Arizona is too small for two wholesalers selling our line. Forgetting all the standard cliches, shelf management is non-existent and uniform marketing that gets results cannot be coordinated with a dual.

This month, Arizona Distributors had a 5 case discount of $15.00 off on Cutty Sark (see attached), coupled with April being a buy-in, makes no sense. Plus, 5 case discounts do not get floors, 50 and 100 case discounts get the action. We sold a lot of goods in but the action to the consumer is not there.

I spoke with Jack Braddock regarding this, and his reason was that he felt that Copper State was always beating his deal by a dollar. By doing this, he would "show Copperstate".

In my opinion, "Showing Copper State" can and will be very detrimental to our over-all long term marketing of Cutty Sark.

I also spoke to Bernie Gellerman and he swears he has not been doing any such pricing.

I am recommending we have Copper State handle our complete line on an exclusive basis.

Regards,

KA:hb

ARIZONA DISTRIBUTING COMPANY

APRIL 20TH THRU APRIL 30TH

CUTTY SARK SCOTCH

(ALL SIZES ASSORT)

		1 CASE	3 CASES	5 CASES
1.75 LITER	(103.80)	10.00	12.00	15.00
LITER	(125.40)	10.00	12.00	15.00
750 ML	(94.80)	8.00	10.00	12.00
500 ML	(138.00)	10.00	12.00	15.00
200 ML	(122.40)	10.00	12.00	15.00

	NET BOTTLES		
	1 CASE	3 CASES	5 CASES
1.75 LITER	15.64	15.30	14.80
LITER	9.62	9.45	9.20
750 ML	7.24	7.07	6.40
500 ML	5.34	5.25	5.13
200 ML	2.35	2.30	2.24

(1.75 LITER AND LITER STILL ASSORT IN PREMIUM FAMILY BAR PLAN)

SPECIAL

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUCKINGHAM CORPORATION, a Delaware Corporation, *Plaintiff,* v. ODOM CORPORATION, a Delaware Corporation, dba ARIZONA DISTRIBUTING COMPANY, *Defendant,* ODOM CORPORATION, dba ARIZONA DISTRIBUTING COMPANY, *Counterclaimant-Appellant,* v. BUCKINGHAM CORPORATION; MAZEL CORPORATION, an Arizona Corporation; COPPER STATE DISTRIBUTORS, INC., an Arizona Corporation, *Counterdefendants-Appellees.*	**Nos. 81-6046, 82-5241** **Order**

Before: POOLE AND BOOCHEVER, Circuit Judges, and MCNICHOLS,* District Judge.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Ray McNichols, Senior United States District Judge for the District of Idaho, sitting by designation.